

EXHIBIT A

1
2 UNITED STATES DISTRICT COURT
3 DISTRICT OF MINNESOTA
4

5

6 Fair Isaac Corporation, a)
7 Delaware corporation,) File No. 16-cv-1054
8) (DTS)
9 Plaintiff,)
10)
11 vs.) Minneapolis, Minnesota
12) December 13, 2022
13 Federal Insurance Company, an) 3:56 p.m.
14 Indiana corporation, and ACE)
15 American Insurance Company, a)
16 Pennsylvania corporation,)
17)
18 Defendants.)
19

20 BEFORE THE HONORABLE DAVID T. SCHULTZ
21 UNITED STATES DISTRICT COURT MAGISTRATE JUDGE
22 **(MOTION HEARING)**

23 **APPEARANCES:**

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20 Proceedings reported by certified stenographer;
21 transcript produced with computer.

1 **P R O C E E D I N G S**2 **IN OPEN COURT**

3 THE COURT: Good afternoon, everyone. We're on
4 the record in the matter of FICO versus Federal, civil
5 number 16-1054.

6 Counsel for FICO, if you'll note your appearances
7 for the record, please.

8 MR. HINDERAKER: Your Honor, Allen Hinderaker from
9 Merchant & Gould. And with me from Merchant & Gould at
10 counsel table is Paige Stradley and Michael Erbele, and
11 behind us is Heather Kliebenstein.

12 THE COURT: Good afternoon to the four of you.

13 Counsel for Federal, if you'll note your
14 appearances.

15 MR. FLEMING: Your Honor, for defendants, Terry
16 Fleming; Leah Godesky, who will be arguing; and Ryan Young.

17 THE COURT: Good afternoon to the three of you.

18 So we're here on a motion to bifurcate the trial.
19 I've read everything, so you don't have to repeat what
20 you've said, but you can certainly find ways of emphasizing
21 it.

22 If you're ready to proceed, go ahead, Counsel.

23 MS. GODESKY: Thank you, Your Honor.

24 Your Honor, we have two very different buckets of
25 damages at issue in this case. First, FICO is seeking

1 actual damages for the breach of contract and copyright
2 claims based on fair market value of a Blaze license for any
3 unauthorized use. And as the Court observed in ruling on
4 the *Daubert* motions on this case, determining the fair
5 market value of the copyrighted work is an objective inquiry
6 that evaluates what a reasonable seller and buyer would pay
7 for a Blaze license in the relevant time period. And we
8 know in 2006, when Federal and FICO engaged in those
9 negotiations, they agreed on a [REDACTED] license fee for
10 an enterprise-wide license.

11 The fair market value question will be decided by
12 the jury, and Federal intends to prove that any actual
13 damages in this case will be much closer to the [REDACTED]
14 license fee that the parties agreed on in 2006 rather than
15 the very fanciful \$47 million license fee that FICO intends
16 to present.

17 Then on the other hand, you have the disgorgement
18 damages claim, and there they're seeking to disgorge up to
19 \$35 billion in profits. And this damages claim will be
20 decided by the Court. You've already held that. And the
21 disgorgement framework is completely different. The core
22 question there will be whether there's a nexus between Blaze
23 and defendants' profits. And so the fair market value for a
24 Blaze license, that proxy for actual damages, and the
25 nuances of how Blaze fit into defendants' business, those

1 are two completely different questions. And as the Court
2 observed in ruling on prior motions in this case, the
3 profits that FICO is seeking to disgorge are not actual
4 damages and they are not a proxy for them.

5 So in addition to the fact that we have two very
6 distinct inquiries taking place here, we're seeking
7 bifurcation because of the enormous prejudice and confusion
8 that would occur if both damage theories are presented at
9 the same time.

10 THE COURT: Let me interrupt you for a second.
11 First of all, you used the word "inquiries," but you could
12 also substitute the word "conclusions" for what I think
13 you're saying, to which their response, at least in paper, I
14 think, is they may be separate conclusions, but some of the
15 evidence that the Court or the jury needs to rely on to
16 arrive at those conclusions is the same. So, for example,
17 in the hypothetical negotiation, the revenues, the gross
18 profits, if you will, of Federal and ACE are relevant to
19 that negotiation.

20 What's your response?

21 MS. GODESKY: So they've identified two categories
22 of allegedly overlapping evidence, and the first one is they
23 say that defendants' alleged revenue from use of Blaze will
24 be relevant to both fair market value and disgorgement.

25 That's wrong.

1 We absolutely agree that defendants' total revenue
2 is relevant to FICO's pricing model, and so that will be
3 considered if the jury is evaluating fair market value,
4 actual damages. But it's a completely different thing to
5 say, as FICO does, that in order to determine fair market
6 value, the jury also needs to consider the specific profits
7 that defendants earned from use of Blaze. That's different.
8 That's a different inquiry. Not just total revenue of
9 defendants, but actually how many profits were defendants
10 earning from Blaze, and that's blurring the distinction
11 between fair market value and disgorgement damages.

12 THE COURT: But wait a second. How does that
13 advance your argument? They're saying when it comes to the
14 hypothetical negotiation, we get to tell the jury, you know,
15 the fact that they're a 13 billion or whatever dollar a year
16 organization is relevant to the license fee we would charge
17 and it's relevant to their expectation of the license fee
18 they would have to pay, so that figure -- that evidence
19 about just total revenue is coming in for that purpose.

20 And then on the disgorgement, 504(b) says you get
21 to dump it into evidence. You know, here's the 13 billion;
22 you sort out what's profit and what's related or not
23 related.

24 MS. GODESKY: Your Honor, there's a very
25 different -- it's very different for FICO to say -- present

1 their pricing model, right, which starts with a very large
2 revenue number, just like it did in 2006. And then when you
3 apply their pricing model to that starting point, you get to
4 a very low number, right? So there was a very large revenue
5 number for Federal back in 2006, billions of dollars, and
6 that got to a [REDACTED] license fee.

7 It is very different for them to open this trial
8 and argue that they are entitled to \$35 billion in disgorged
9 profits. That framing is enormously prejudicial, and the
10 anchoring effect of presenting that argument from the outset
11 of the trial just cannot be denied.

12 Your Honor, 1 percent of \$35 billion is \$350
13 million, right? And we cite cases in our papers, like the
14 Federal Circuit case in that *Uniloc USA* case, right? There
15 was an observation from the Federal Circuit about how a
16 disclosure that a company has made even only \$19 billion has
17 an enormous anchoring effect regardless of whether evidence
18 is then later presented that shows that the infringed
19 product contributed to a small, small portion of it.

20 And so it's true, the jury is going to hear that
21 these companies have a lot of revenue, right? But then the
22 math of how FICO actually then calculates its license fees
23 in these traditional arm's length transactions translates to
24 a much smaller dollar figure, right? It's very different to
25 say these companies make a lot of money than it is to say we

1 are entitled to disgorge, ladies and gentlemen of the jury,
2 \$31 billion in profits.

3 THE COURT: So a different way of coming at it,
4 isn't the logical conclusion of what you're arguing then is
5 not that the case should be bifurcated -- the trial should
6 be bifurcated, but that I shouldn't impanel an advisory jury
7 on the question and I should just allow all the evidence to
8 come in, and they have to figure out the license fee and I
9 have to figure out what, if any, profits are to be
10 disgorged?

11 MS. GODESKY: No, Your Honor, because the
12 prejudice point, the confusion point, if the evidence is
13 presented around the impact of Blaze or alleged impact of
14 Blaze on defendants' business, the \$31 billion damages
15 number, the days, probably a week of testimony about whether
16 and how Blaze functioned within defendants' business, all of
17 that is enormously confusing and distracting.

18 This is a breach of contract case, right? And you
19 can imagine the opening statement in a trial where we're
20 presenting evidence relevant to disgorgement is going to
21 address the nuances of Blaze, how it worked within
22 defendants, right? That's a whole frolic and detour into a
23 week's worth of evidence that wouldn't need to be presented
24 if we're just focusing the jury on the very clear questions
25 of what is the nature and effect of Section 10.8 and 3.4 of

1 the agreement.

2 THE COURT: Wouldn't you want that evidence about
3 a frolic and detour to come in to hold down the license fee
4 too? I mean, wouldn't you want to say -- they want to say
5 that we would have negotiated -- that reasonable people
6 would have negotiated a \$47 million license but, in fact,
7 Blaze is just a tiny piece of a very large set of software
8 that's only, within that, a tiny piece of our business,
9 blah, blah, blah, blah, blah. All that, what you've
10 described as a frolic and detour, also can be used to argue
11 that so, therefore, the license fee really isn't that high
12 or shouldn't be.

13 MS. GODESKY: Your Honor, there may be, and of
14 course there will be some evidence in a trial even if
15 disgorgement is bifurcated in terms of what Blaze is and how
16 it functioned in defendants' business. We don't deny that.
17 They're going to need to describe what their product is.
18 We're going to need to describe how the business used it.

19 But I think, for the most part, in terms of
20 defending the actual damages claim, what you're going to see
21 from us is a presentation of evidence that focuses on the
22 arm's length transaction that happened between these parties
23 in 2006; the many, many, many arm's length transactions that
24 have occurred between FICO and other similarly situated
25 customers over time, none of whom entered license agreements

1 even approaching the orders of magnitude of what they're
2 demanding here.

3 And so no, I don't think in order to defend
4 against the actual damages claim there is going to need to
5 be this frolic and detour into the types of recited evidence
6 that you see in their opposition brief, page after page
7 after page from their perspective touting the benefits of
8 Blaze.

9 What we want to do in this trial is focus the jury
10 on the question of, was there a breach of contract? What
11 was the parties' intent when they entered into this license
12 agreement in 2006?

13 And I think when you read FICO's opposition
14 papers, you know, there's sort of very short shrift given to
15 the nature of evidence that would have to be presented on
16 this disgorgement claim. I think they say, oh, we just need
17 to put some numbers on a screen and have our expert describe
18 them, but that cannot be further from the truth. I mean,
19 you have to examine each of the applications in which Blaze
20 was used. We have to examine it from a computer science
21 sense, right? What did it mean that this particular
22 software program was one of many that comprised the
23 application? We have to examine it from a business sense.
24 What did it mean that this rules-based software program was
25 used when the rules were written by Federal employees, and

1 what type of impact did it have on the ability to bring in
2 business on an application-by-application basis? I mean,
3 that is days of testimony that would not be needed at all if
4 we're centering the jury on the breach and copyright
5 questions and actual damages.

6 And on that point, I would refer the Court to the
7 Oracle case that we cite in our papers. I think there was a
8 very astute observation from the judge in that case where
9 there was a bifurcation of certain monetary relief, and the
10 judge said that those questions of monetary relief were
11 poised to present bone-crushing analytics on how to
12 apportion profits attributable to infringement versus
13 profits attributable to non-infringement. So our trial was
14 managed by postponing that mind-bender to phase 2 so that
15 the jury could give its undivided attention in phase 1 to
16 fair use.

17 And what the jury needs to do in this case is give
18 its undivided attention to the question of was there a
19 breach of contract? What did the parties intend when they
20 entered this license agreement? Not be, you know, head in
21 the -- head in the stars thinking about \$350 million in
22 disgorgement damages.

23 THE COURT: But that argument really seems to
24 prove a slightly different point, which you haven't asked
25 for, and which is better that the trial be bifurcated

1 between liability and damages, which you haven't asked for
2 and isn't going to happen, okay? But that's what that seems
3 to suggest to me, that quote from *Oracle*.

4 MS. GODESKY: I don't think so, Your Honor,
5 because I think the bone-crushing analytics that would be
6 required to assess the damages claim, that applies here to
7 disgorgement, right, those very complicated questions of
8 what did Blaze do within these different applications and
9 how did it affect the defendants' ability to sell insurance,
10 which, you know, is not involved at all in evaluating the
11 actual damages claim. So I think that that case quote is
12 exactly on point because the nuances of apportionment on a
13 computer application by computer application basis is, you
14 know, mind-bending.

15 The other thing I'll say in terms of the argument
16 from FICO that there would be overlapping evidence and this
17 question of whether actual and anticipated profits would
18 come into evidence in evaluating both damages claim, I would
19 point out to the Court that all of the cases that they cite
20 on this, the *Navarro* case, the *Pinn* case, the *Interactive*
21 *Pictures* case, the *Probatter* case, those are all cases
22 involving damages based on a reasonable royalty rate. And
23 so it's not surprising that the Court in those cases said,
24 yeah, you know, actual profits, future profits, those are
25 relevant to assessing actual damages because when you're

1 evaluating a royalty rate, you have to consider profits.
2 That's going to be part of the hypothetical negotiation,
3 right? If you have a 10 percent profit margin, you're not
4 going to give an 11 percent royalty rate. That would not be
5 a rational choice.

6 Whereas here, you know, the question of profits
7 doesn't need to come in at all. And we know that, Your
8 Honor, because we have the benefit of knowing exactly how
9 FICO does business. The record in this case shows, and they
10 say in their opposition brief, the way that they negotiate
11 these license agreements is they look at the revenue that
12 the counterparty brings in, and then they have a formula,
13 and then they also take into account the scope of the
14 license in certain instances, how broadly is it going to be
15 used? But there is never an analysis in their arm's length
16 transactions of the types of profits that are being derived
17 from the use of Blaze. That wouldn't be possible in an
18 arm's length transaction.

19 So these cases that FICO cites in their opposition
20 are really inapposite to the question presented here.

21 THE COURT: Go back to *Navarro* for a second. I'll
22 confess that I had focused on a different aspect of that
23 decision and perhaps missed the nuance that you pointed out
24 that the actual damages in that case were reasonable
25 royalty. Is that right?

1 MS. GODESKY: That's correct, Your Honor. I don't
2 have the *Pinn* cite. I know it's at the very end of the
3 opinion.

4 THE COURT: But it was a copyright infringement
5 matter.

6 MS. GODESKY: It was a case where the question was
7 a photograph on an Oil of Olay product and whether there was
8 a -- you know, the copyright to the photo on the Oil of Olay
9 lotion bottle, right? So the type of damages, the Court
10 says at the end of the opinion, was a reasonable royalty
11 rate, and so that's why they were considering the profits
12 from that Oil of Olay product.

13 And I would also say on *Navarro*, since FICO so
14 heavily cites it, is that's a different case. I mean, that,
15 yes, admittedly involved large numbers too. It involved
16 \$600 million in revenue. That was the number that the
17 plaintiff wanted to put out to the jury. \$600 million, Your
18 Honor, is not 335 billion, right? One percent of 600
19 million is \$6 million. One percent of 35 billion is \$350
20 million. These numbers have an enormous anchoring effect,
21 and it is not surprising that FICO wants to be able to put
22 that number out in front of the jury from day one.

23 And I would say that the prejudice and confusion
24 concerns that we've highlighted in our brief are even
25 amplified here because we're talking about an issue that the

1 jury won't even be deciding at all.

2 THE COURT: Okay.

3 MS. GODESKY: Those are the primary points I
4 wanted to cover, Your Honor, unless the Court has further
5 questions.

6 THE COURT: Well, I don't think so, although --
7 well, why can't this all be -- if I were to agree that
8 you've raised some concerns, to the extent that the concern
9 is prejudice in the form of confusion or the anchoring
10 effect of big numbers, why can't those all be handled by
11 careful pretrial or preliminary instruction as opposed to
12 bifurcation?

13 MS. GODESKY: I understand, Your Honor, that the
14 Court obviously is starting from the assumption that the
15 jury will proceed as instructed, and we certainly are too,
16 but I do think, you know, the *Uniloc* case and that Federal
17 Circuit case had it right with that \$19 billion damages
18 figure having just too high of an anchoring effect.

19 And I think that's particularly true here, given
20 not only the fact that we're talking about 35 billion,
21 right? It's an enormous number. But also when you compare
22 it to the actual -- like the reasonable realm of damages for
23 fair market value, right? When these parties were
24 negotiating back in 2006, they agreed on a [REDACTED]
25 license fee. So that risk, that anchoring effect, is

1 enormous here.

2 And then I don't think an instruction could cure
3 at all the confusion. The week of testimony, dense expert
4 testimony walking through application by application,
5 dueling expert opinions, dueling witness opinions, on how
6 Blaze impacted the defendants' business. I mean, that is
7 a -- I will use the phrase again -- frolic and detour that
8 has nothing to do with the central questions that this jury
9 is impaneled to answer, which are, is the contract breached
10 and was there copyright infringement.

11 THE COURT: And if so, how much damages are they
12 owed?

13 MS. GODESKY: And if so, how much actual damages
14 are they owed, yes.

15 THE COURT: And your argument on anchoring effect
16 is that when and if the jury comes to that question, how
17 much damage they're owed, actual damage, they won't be able
18 to adequately analyze that number because they will be
19 influenced by the \$35 billion number.

20 MS. GODESKY: Correct. And I also think there
21 could even be prejudice to Federal's defense of the
22 liability question in this case, right? If you have the
23 jury consider and evaluate, spend weeks on this, right, the
24 extent of the connection between Blaze and defendants'
25 profits and hearing these giant numbers, that could suggest

1 to the jury that Blaze is far, far, far more valuable than
2 the [REDACTED] that Federal paid, right? And that could
3 also taint the consideration of the liability question as
4 jurors inevitably, you know, grapple with questions of
5 fairness.

6 THE COURT: Well, I'll say it again in a different
7 fashion. It's a sword that cuts in both directions, right?
8 Because the evidence that you'll put on about how Blaze
9 really didn't do very much and it wasn't that useful and
10 we're the ones that wrote the rules and et cetera, et
11 cetera, all of which, to the extent it comes in, comes in at
12 least primarily on the disgorgement side. Maybe not. It
13 also has a tendency to hold down the reasonable license fee,
14 doesn't it?

15 MS. GODESKY: I think my answer on that is the
16 same, Your Honor. I do think some of that is relevant to
17 holding it down, but there is enormously powerful evidence,
18 objective evidence of, you know, FICO's license fee to
19 Federal and FICO's license fee to other similarly situated
20 counterparties that any reasonable juror is going to see
21 that that \$47 million number is enormously inflated.

22 THE COURT: Okay. Thank you, Counsel.

23 MS. GODESKY: Thank you, Your Honor.

24 THE COURT: Mr. Hinderaker.

25 MR. HINDERAKER: Thank you, Your Honor.

1 THE COURT: Rather than let you get started, let
2 me jump to one thing and then you can go back and get
3 started.

4 MR. HINDERAKER: I had such a good opening line
5 too.

6 THE COURT: What's that?

7 MR. HINDERAKER: I had such a good opening line
8 too. I'm sorry.

9 THE COURT: Go ahead.

10 MR. HINDERAKER: Well, what I was going to say,
11 Your Honor, is that this lawsuit is between some very big
12 corporations -- companies. FICO is a worldwide company with
13 annual revenue over a billion dollars. There is no
14 prejudice card that either party has to play. There is no
15 sympathy card that either party has to play. We're just too
16 big. It isn't David versus Goliath.

17 Both parties, the best we can ask for is a just
18 result on the evidence, on the law, and that's what we
19 should get. And I think you're -- and my comments are going
20 to be directed to doing exactly that with the advisory jury.

21 THE COURT: I think -- well, on that statement, I
22 agree. I don't think that -- this isn't a case with an
23 injured person -- a physically injured person suing a huge
24 corporation and you worry about the jury saying, give her a
25 million or two; it's, you know, nothing off -- it doesn't

1 hurt them.

2 But I heard two things in particular of interest
3 that I want you to address. One is this notion, at least as
4 I'm understanding it -- I don't think I quite understood it
5 in the same way when I read the papers. But what I'm
6 hearing is that, for lack of a better way of putting it,
7 there's a right number, whatever it is. The jury will
8 decide what the number is for actual damages. They think
9 it's a lot smaller than you think it is.

10 Their concern is once the jury starts hearing \$35
11 billion, that what they're going to -- it's not that they're
12 going to be motivated by sympathy, but they're going to use
13 that figure to overestimate or overcalculate the license fee
14 figure.

15 What's your response to that?

16 MR. HINDERAKER: I'm going to give a long-winded
17 one, and it starts with the proposition that FICO has the
18 right to try its case. This argument started with the
19 notion that our damages for lost license fees is
20 approximately [REDACTED] because we licensed that amount
21 in 2006. Nonsense.

22 Our interrogatory answers detail out the basis of
23 our lost license fee as \$47 million. The lost license fee
24 is based upon an annual license fee for each year in which a
25 Blaze advisor was used without authority, a stark contrast

1 to the perpetual license fee that was negotiated in 2006
2 with a very different organization.

3 In 2016, when we had the assignment event, when
4 the Chubb Corporation was acquired by a much larger
5 insurance company, there were negotiations for a perpetual
6 license that FICO premised off of a \$30 billion enterprise,
7 which was at the time of 2016. That number is in. That
8 number relates to our commercial purpose and our
9 understanding of the breach of paragraph 10.8. It also
10 relates to the license fee that we sought at that time,
11 which was also a perpetual one.

12 THE COURT: Which was what, if I might ask?

13 MR. HINDERAKER: About [REDACTED].

14 And our witnesses are going to have to answer the
15 question, why are you seeking \$47 million now for four years
16 of use, of unauthorized use, when you were willing to
17 negotiate a perpetual license for three and a half million?
18 And we will answer that. We will answer that to the -- we
19 will answer that on the primary proposition that when we
20 priced that perpetual at [REDACTED], we had a lot of other
21 value in place that we felt deserved recognition, and we
22 priced [REDACTED] to get that perpetual business relationship for
23 all of the reasons that will be described at the trial. In
24 terms of our theory of the case being honored, our witnesses
25 will explain how \$47 million for four years of unauthorized

1 use is reasonable in light of that perpetual negotiation.
2 They're very different.

3 Now, Judge Wright has a nice quote that also is
4 part of the answer to the question, which is not
5 acknowledged, but it is this: She was discussing the
6 evidence that's relevant to our lost license fee claim, and
7 she says, quote, at page 55 of the summary judgment order,
8 "This includes evidence of FICO's standard pricing
9 methodology and together with evidence of defendants' use of
10 Blaze Advisor."

11 So we will put in our evidence of our standard
12 pricing methodology. And we price annual license fees on a
13 standard basis much, much different than we do a perpetual,
14 for all the reasons we'll describe. And then when we put on
15 the evidence of the annual license fee per our standard
16 practices, we will, according to -- and we have to. Judge
17 Wright didn't like how we were doing it before and she says,
18 you have to look at the objective evidence of how the
19 defendants are using the software. And we will do that for
20 the lost license fee. And one thing I do agree with is that
21 our lost license fees are application by application by
22 application.

23 So, for example, we have -- the largest annual
24 license fee that we seek for the largest application is
25 about [REDACTED] for one year. The jury should hear why

1 that's a reasonable amount. It's a reasonable amount for at
2 least these two reasons: One, it's connected to revenue
3 transactions resulting in, just for that application, more
4 than \$1,500,000. Our license fee is seeking less than
5 [REDACTED] of the revenue that's connected to
6 the use of Blaze Advisor.

7 They should also hear for the reasons -- for the
8 intrinsic value of Blaze Advisor to the defendants, all
9 right, it's connected to the revenue, but what good -- how
10 is it connected? It's connected to the revenue because it
11 automates the policy administration system, and if you don't
12 have a policy administration system, you can't sell
13 insurance.

14 They will have their expert testify about, well,
15 it's just one little bit and one little bit of a big
16 application. And our fact witnesses will say it's the
17 brains or the central nervous system of the application and
18 you cannot automate the human underwriting process without
19 it.

20 So that's part of my long-winded answer. The rest
21 of the answer I think is this, Your Honor: Underlying the
22 argument that you've heard is this notion that FICO has the
23 obligation to prove profits, FICO has the obligation to
24 prove the nexus to profits. In addition to not being aware
25 of FICO's interrogatory answers, the argument simply ignores

1 Judge Wright's ruling on summary judgment. FICO's
2 obligation disgorgement is one -- well, it's two things:
3 How much revenue is connected to the use of the
4 applications? Second thing, does the application
5 contribute, at least in some part, to the generation of that
6 revenue? That's FICO's burden to prove.

7 And on that second place, it also goes to the
8 intrinsic value. The application is important to the
9 would-be licensee because they use it in a system central to
10 the whole process of selling insurance. That's intrinsic
11 value. How useful is it to the process of selling
12 insurance? How significant is it? That's more than \$1.5
13 billion a year. You add up all of those revenue streams on
14 each application, times ten applications times four years,
15 and you get to \$35 billion.

16 There's another application that they have where I
17 think our annual license fee that we seek is [REDACTED] -- rather
18 than [REDACTED]. Well, why? There isn't much
19 revenue connected to it. It doesn't do as much. It's not
20 as central to their business processes. Central to their
21 business processes is intrinsic value for lost license fees.
22 Central to their business processes is it makes a
23 contribution to revenue, at least in part, under 504(b). It
24 is the same.

25 In my mind, when counsel argues everything is

1 premised off of a profit finding, it's certainly wrong as a
2 matter of law per -- well, it's certainly wrong as a matter
3 of law, and Judge Wright happens to agree with it.

4 But I also think there's some of this to it. You
5 know, in their brief they say our proof of disgorgement is
6 specious. Well, why do they say that, I say? Well, if we
7 don't have any proof of disgorgement, well, then offering
8 the proof of \$35 billion of use of our applications for the
9 four years of unauthorized use doesn't have any value,
10 doesn't have any relevance because our claims are specious.
11 But if you turn that proposition around, then you -- our
12 claims are not specious and then the whole argument falls
13 for a false premise.

14 The *Uniloc* case, which was mentioned a couple
15 times, is worth a few comments. It's a patent case, not a
16 copyright case. In patent law, the patentee has the
17 obligation to apportion and determine the extent to which
18 the technology contributed to the business benefit, to the
19 revenue, to the profit. It is the patentee's obligation to
20 figure out that extent to profit from the technology that is
21 part of a bigger system.

22 That case stands for that proposition. In that
23 case, the patentee acknowledged that the technology did not
24 drive market demand. The patentee acknowledged he has no
25 basis for seeking damages for the full market value and yet,

1 in the trial he does the 19 billion full market value
2 number.

3 None of that is these facts. One, FICO has the
4 obligation to prove gross revenue. Any apportionment is for
5 them, not us.

6 Two, our evidence of gross revenue is directly
7 connected to the infringement, and the analogy would be
8 directly connected to that little piece of technology in the
9 big piece. We're not -- and in our case, directly connected
10 to the infringement of Blaze Advisor.

11 THE COURT: Say, hang on a second. Say that
12 again. Gross revenue is directly connected to the
13 infringement?

14 MR. HINDERAKER: In this case?

15 THE COURT: Yeah.

16 MR. HINDERAKER: Yeah. That's the disgorgement
17 case.

18 THE COURT: I'm not sure I'm following that point.
19 The gross revenue is directly connected -- at least as I
20 understood it, directly connected to or relevant to the
21 hypothetical negotiation on the actual damages side. And
22 then the gross revenues are the starting point for
23 disgorgement, assuming you can connect them to the use of
24 Blaze Advisor, right?

25 MR. HINDERAKER: Gross revenue is the starting

1 point for disgorgement.

2 THE COURT: Right.

3 MR. HINDERAKER: The defendants' interrogatory
4 answers identify the amount of money connected to the use of
5 Blaze Advisor applications. Their interrogatory answers
6 answer that question: How much revenue is connected to the
7 use of these applications over the infringing period?

8 THE COURT: I remember we -- I seem to recall we
9 had a discovery dispute about that.

10 MR. HINDERAKER: We did.

11 THE COURT: Okay.

12 MR. HINDERAKER: So there's nothing complicated
13 about putting a table up before the jury that says these are
14 the numbers for these applications according to their
15 interrogatory answers.

16 THE COURT: This is the revenue associated with
17 these applications which use Blaze Advisor.

18 MR. HINDERAKER: Exactly. And only that revenue.
19 Unlike the *Uniloc* situation, only that revenue.

20 And then our other primary burden under 504(b) is
21 to show that using the application made some contribution to
22 the generation of that revenue. And that's where we get
23 into what does the application do? How does it do it? How
24 is it connected to the selling process? That's evidence
25 that 504(b) makes a contribution to revenue. It's also

1 exactly evidence of intrinsic value of the business purpose,
2 the value of why a licensee would pay something for the
3 license.

4 There's this argument a number of times about some
5 bone-chilling -- no, bone-crunching testimony about
6 apportionment. Like I said, in a patent case, the plaintiff
7 carries that burden. In a copyright case, the defendant
8 carries that burden.

9 Their damages expert is a fellow by the name of
10 Bakewell. Bakewell was asked, were you engaged to apportion
11 these revenues to the extent they were related to the
12 infringement as opposed to other factors? And he says, no,
13 I wasn't asked to do that; it wasn't part of my engagement.
14 I don't know of an expert that they have with bone-crushing
15 complexity in terms of apportionment.

16 They have another expert, more of a technology
17 side, but he didn't do any factual analysis. He just said,
18 well, all the revenue is because they're great companies and
19 they have rules of decision-making, and you use automation
20 to make them more efficient, but that doesn't generate the
21 revenue. That's not a hard argument. It's what they have.
22 The jury can understand it. They'll have counterevidence
23 from us. But this notion of bone-crushing complexity is not
24 something that I understand from our six years of discovery.

25 The *Navarro* case, Your Honor, that you mentioned,

1 it was a copyright case, it was photographs, and the
2 reasonable royalty was built off of profits, naturally so.
3 And again, there the amount of damages was directly linked
4 to the benefit from the use. And I can't tell you off the
5 top of my head whether the profit number was because -- I
6 think the profit number was because of the defendants'
7 evidence, that the judge said, well, Defendant, you're going
8 to want to put in your profit number for the reasonable
9 royalty, the same profit number that's disgorgement.

10 In this case, Mr. Bakewell, the damages expert, he
11 will -- he's opined that the profits are 2.456 billion.
12 Now, if I was the defendants and I was listening to the
13 evidence of the amount of license fees that we want, because
14 our applications in one year generate -- over all ten of
15 them, you know, generate \$12, \$15 billion worth of revenue,
16 I'd want the jury to hear if I was the defendant, well, yeah
17 it does, but that revenue is, you know, 2.45 billion. Now,
18 it's still a billion, but it's not the numbers that we're --
19 you know, that the jury is going to hear the full case.

20 Apparently, according to the defendants, that's
21 not relevant to intrinsic value. I don't understand that
22 because it certainly is. And if they don't want to give it
23 to the jury, then that's fine with me. But this notion of
24 no overlapping evidence simply isn't true.

25 And frankly, I think that when the Court's idea of

1 using an advisory jury so that we can -- the Court's idea of
2 using an advisory jury will be beneficial to avoiding any
3 confusion.

4 We should have a case where each witness comes to
5 the stand and testifies once. Because everything is
6 overlapping, testifies completely once.

7 THE COURT: Let me ask you a grubby factual
8 question. And recognizing you're an officer of the court,
9 so let's -- we've got the case on liability and actual
10 damages proceeding, and we've got a separate case on
11 disgorgement. How many witnesses do you call in this case
12 that you then call back on this case? That's the first
13 question.

14 MR. HINDERAKER: Well, I was going to say whether
15 it was going to be all of them or not. We have one witness
16 who's primarily professional services. Probably not him.
17 But we have -- the FICO fact witnesses are going to describe
18 what automated decision-making with Blaze Advisor means and
19 does and how you take a company's rules of decision, let's
20 say underwriting, and how do you automate the human
21 decision-making process of deciding whether to give John
22 Jones, you know, a homeowner's policy without human
23 involvement? They will testify to that. I think that
24 testimony is directly relevant to the intrinsic value of
25 Blaze Advisor to their business. That's why they meet with

1 customers. Here's our value proposition to their business.
2 Intrinsic value. That same testimony is that's how Blaze
3 Advisor contributes to the generation of revenue. It's
4 connected to a revenue generation event and it helps.

5 So the damages expert will be the same. The
6 insurance industry expert would be in both places. The
7 people negotiating the terminating the -- the business
8 people involved in terminating the contract will be in both
9 places. In addition to the professional service person,
10 there is a person who was involved in negotiating the 2006
11 license. She would be not one. And there was a person who
12 was involved in the termination of the license in 2016, and
13 he's not one.

14 So to answer your question the best I can, I can
15 think of three witnesses who do not -- whose testimony does
16 not relate to both the intrinsic value of the software to
17 the business and to the contribution the software makes to
18 the revenue.

19 THE COURT: And within those witnesses who
20 straddle both cases -- and I recognize, you know, number
21 one, this isn't exact, and number two, obviously you're
22 going to say one thing, they're going to say another -- but
23 what is your estimate of the overlap between those
24 witnesses? Half of what they say in the first trial they're
25 going to say again in the second trial? What's your

1 estimate?

2 MR. HINDERAKER: I can think of some where the
3 overlap is 100 percent because intrinsic value and the
4 contribution to generating revenue are the same thing. I
5 mean, business purpose, how do you use it in the business
6 and the question, how does that generate revenue? Why do
7 you use it in the business and how does it generate revenue
8 are the same thing.

9 Some witnesses will be -- some witnesses will be
10 maybe 50 percent. I can't sort out -- in my own mind, I
11 can't sort out -- here's why somebody licenses Blaze
12 Advisor: Because it generates revenue. And a witness will
13 say that. Nobody licenses Blaze Advisor for any other
14 reason.

15 Well, that's the intrinsic value, but it's also
16 part of the 504(b) disgorgement proof. And because we don't
17 have -- we don't try to prove profit, we don't try to prove
18 what portion is not attributable to infringement, those
19 issues aren't on our witness list. Another way of answering
20 your question, I don't have any witness, other than the
21 three that I mentioned, that I think are exclusively
22 compensatory damages, intrinsic value.

23 THE COURT: Okay. Thank you, Mr. Hinderaker.
24 Anything further, or are you good?

25 MR. HINDERAKER: Nothing further, Your Honor.

1 THE COURT: Okay. Thank you.

2 Ms. Godesky.

3 MS. GODESKY: Godesky. May I make just four brief
4 points, Your Honor?

5 THE COURT: Yes. Godesky?

6 MS. GODESKY: Godesky, yes.

7 So four points, if I may. Number one, we agree
8 they have every right to try their case on actual damages.
9 They can put out their \$47 million figure and the evidence
10 that they say supports it. No one is talking about limiting
11 the evidence on that front. What we are talking about is
12 there's a separate issue with numbers that dwarf that \$47
13 million figure that the Court has decided the Court will not
14 even decide. And so the anchoring effect, the possibility
15 of split-the-baby considerations, right, all of those things
16 that are as old as time, and *Uniloc* is not the only case
17 that raises them, should absolutely factor into the decision
18 here.

19 Number two, I heard a lot of talk from counsel
20 about this concept of intrinsic value, and they spend a lot
21 of time in their papers talking about how the intrinsic
22 value of Blaze is relevant to the hypothetical negotiations
23 for the license fee, and I don't know where that came from.
24 There is no authority cited in their papers for this idea
25 that intrinsic value is relevant to calculating fair market

1 value. And it's not. Because, again, how it was just
2 described by counsel, this concept of intrinsic value is,
3 "how significant it is to the process of selling insurance
4 in terms of revenue generated." That is not information
5 that FICO has when it's negotiating an arm's length
6 transaction with an insurance counterparty. That is
7 information that counsel said several times they obtained in
8 litigation through our interrogatory responses, but that is
9 not how they go about pricing their license agreements.
10 They consider other things, and their witnesses will testify
11 about it. But no one is going to say that in a typical
12 arm's length transaction they walk through an analysis of
13 how many profits are generated because of use of Blaze.

14 The third thing, I would say we don't think it's
15 necessary, Your Honor, to have an advisory jury on this
16 topic. We do object to that. But if that's the direction
17 the Court is headed because of appellate concerns or
18 whatever else might be driving it, there could still be an
19 advisory jury even with bifurcation. That doesn't need to
20 be a barrier to bifurcating the case.

21 And then finally, counsel has not articulated any
22 real prejudice to FICO that even begins to compete with the
23 enormous prejudice to defendants if disgorgement is
24 presented from the outset of this case. Number one, there
25 would not need to be a repetition of evidence. Everything

1 that's said during phase 1 could be deemed admitted into the
2 record and the Court could consider it in ruling on
3 disgorgement in phase 2. There would not be a need to
4 recall witnesses to say the exact same thing.

5 The other piece of this is I went through
6 counsel's paper and they identified in those pages and pages
7 of purportedly overlapping testimony, expert witnesses and
8 three fact witnesses who would be giving testimony on this
9 topic. The experts, they're paid experts. It's not the
10 biggest imposition in the world to require paid experts to
11 appear twice. That's what they do for a living. That's not
12 prejudice.

13 And then as for the three fact witnesses
14 identified in the papers, there's a Mr. Waid, a Mr. Wachs,
15 and a Mr. Baseman, and as I understand it, two of those
16 gentlemen are current FICO employees. You know, they are a
17 plaintiff in this case, and so I'm sure it can be easily
18 accommodated to have those gentlemen appear twice if need
19 be.

20 So what we're left with is the possibility of one
21 former employee potentially being called to provide
22 additional testimony on a second day. That is not prejudice
23 that can overcome the anchoring effect and the risk
24 associated with these eye-popping numbers.

25 Thank you.

1 THE COURT: Okay. Thank you.

2 Mr. Hinderaker.

3 MR. HINDERAKER: Can I respond to those four
4 points?

5 THE COURT: Go right ahead.

6 MR. HINDERAKER: Relevant evidence is never
7 unfairly prejudicial. The so-called anchoring, it isn't
8 anchoring for an improper purpose, if there is any
9 anchoring, which I don't see. Nevertheless, the numbers
10 come in because it's relevant evidence to the fair market
11 value of the lost license fees.

12 Counsel says she doesn't know where this intrinsic
13 value proposition comes from. I refer her to Judge Wright's
14 summary judgment order and *Daubert* order. I think it's
15 docket number 731. She lays out the law and the
16 propositions with respect to that. This is one of those
17 points where it's noteworthy about what isn't said and said
18 depending on what the motion is.

19 Mr. Bakewell testified to the fact that in a lost
20 licensing fee situation -- McCarter testified to the fact
21 that there's no contribution to revenue because the
22 defendants could use a different product than Blaze Advisor.
23 Mr. Bakewell picks up on that. He's a damages expert. He
24 doesn't know anything about the technology. He picks up on
25 that. And the point being that Judge Wright says: The same

1 evidence, that is, alternative products, is relevant to two
2 different legal propositions. Mr. Bakewell can testify to
3 the fact that there are products alternative to Blaze
4 Advisor as part of his lost license fee negotiation,
5 downward factor hypothetical, and it also bears on the
6 proposition of disgorgement and any contribution to revenue.

7 The other point -- another point, the law of
8 damages for infringement is it's a bit backward-looking, but
9 it's the lost -- it's the hypothetical negotiation at the
10 time of infringement for the unauthorized use. As I hear
11 counsel's argument, the proposition is that we would license
12 on a perpetual basis, ongoing business relationship basis,
13 to someone who has infringed our copyrights for four years.
14 It's a non sequitur. It's not how it works. At the time of
15 infringement, what's the value of the fee -- of the software
16 that you're using without authority.

17 And then finally, as I hear the argument, FICO
18 would be -- would not be permitted to tell the jury that its
19 lost license fee numbers are very reasonable because
20 automated decision-making with Blaze Advisor brought, in the
21 aggregate over four years, \$35 billion worth of value
22 through this company -- or these companies. That's fair
23 that we be able to do that. \$47 million is not a huge
24 percentage of that number, but it aligns with how we license
25 and the value that the software gives.

1 THE COURT: Okay. Thank you, Mr. Hinderaker.

2 MS. GODESKY: Nothing further, Your Honor, unless
3 the Court has questions.

4 THE COURT: All right. This motion is submitted.
5 We'll get an order out very quickly.

6 While you're all here, I think I said when you
7 came back we would have further discussion -- maybe I
8 didn't; everybody is looking perplexed -- about the jury
9 instructions and special verdict form I gave you all. I was
10 looking for feedback on that. And Ms. Kliebenstein -- I
11 almost called you Scobie -- you had said that you and
12 Ms. Janus had worked out a proposal for some deadlines for
13 motions in limine or had at least talked about that.

14 So does anybody recall this other than me? Is
15 this just me?

16 MS. KLIEBENSTEIN: I recall the discussion on the
17 schedule, and I think we should be in a position to
18 submit --

19 MS. GODESKY: Very soon.

20 MS. KLIEBENSTEIN: Yeah. So there are two -- it's
21 going to be a proposed schedule with, you know, all the nuts
22 and bolts that go along with trial. There are going to
23 be two areas where we don't agree --

24 THE COURT REPORTER: I'm sorry. I can't hear you.

25 THE COURT: Yeah, come on up to the podium.

1 Sorry.

2 MS. KLIEBENSTEIN: We'll be submitting shortly to
3 you a proposal for all of the trial -- the pretrial dates
4 with all the nuts and bolts, jury instructions, things like
5 that, modifications to the same.

6 There are two areas where we don't agree, the
7 trial brief and the findings of fact and conclusions of law,
8 so that document will set forth both parties' position for
9 you to make a decision on your final order.

10 And we can submit that -- do you prefer an email
11 so you have a Word copy?

12 THE COURT: Yes.

13 MS. KLIEBENSTEIN: Okay.

14 THE COURT: If I heard you properly. An email to
15 chambers, copying opposing counsel.

16 MS. KLIEBENSTEIN: Perfect. And we'll have that
17 within the next day or two, the last drafts with Fredrikson.

18 THE COURT: And in that process, am I getting any
19 input from you on verdict form, instructions, et cetera?

20 MS. KLIEBENSTEIN: Eventually. Oh, Al is going to
21 take it back.

22 MR. HINDERAKER: I can answer that, Your Honor.

23 THE COURT: Come on up.

24 MR. HINDERAKER: Yes, it will.

25 First, with respect to the scheduling order that

1 the parties are negotiating, everything has -- nothing
2 Heather said is wrong. Just the rest of the story is that
3 FICO requested an opportunity to file trial briefs and
4 findings of fact and conclusions of law per the local rules,
5 and the defendants don't want to. That's the conflict. Not
6 the date.

7 THE COURT: Okay.

8 MR. HINDERAKER: In terms of your other question,
9 I can tell you that our intention is to take your special
10 verdict form as well as the instructions that you suggested
11 or, you know, the beginning of them and meld them as best we
12 can into FICO's proposed jury instructions. I know that we
13 don't agree with everything that was in yours, and we'll
14 tell you why, and to the extent that yours are what we would
15 have done anyway or are doing, we'll let you know that this
16 is the same as what you proposed.

17 So that's how I intend, on FICO's behalf, to get
18 FICO's proposed jury instructions to you in a way that melds
19 with what you have given us or identifies any conflict.

20 THE COURT: Yes. I want to know what you're
21 changing and why, as it were, a low-brow way of saying it.

22 MS. GODESKY: Mr. Young.

23 MR. YOUNG: Yeah, Your Honor, I can respond.

24 THE COURT: You've got to come up here so we can
25 all hear you, though.

1 MR. YOUNG: Well, I don't have much in addition to
2 add. As Ms. Kliebenstein said, the parties have exchanged
3 proposed orders. You know, we're largely in agreement in
4 terms of dates to exchange things. We've provided dates in
5 which we would exchange, you know, comments to the proposed
6 jury instructions, special verdict form, so we'll get those
7 to you.

8 The areas in which there are disagreement, I mean,
9 this will be set forth in our proposal to you, but in terms
10 of trial briefing, we certainly understand the local rules
11 provide for trial briefing. In this case, we feel that, in
12 general, the generic sort of rule regarding trial briefing
13 and what is generally submitted is largely going to be
14 information that, you know, we've covered in extensive
15 briefing, and we also understood from your guidance at the
16 first pretrial that, you know, in general, trial briefing
17 probably wouldn't be of a substantial amount of assistance
18 in this case. Certainly if there's, you know, areas of --
19 you know, factual areas or legal areas that you want the
20 parties to address in briefing, we'd be happy to do that.
21 We just think that it's better than submitting just general,
22 generic trial briefing that we don't think will be of, you
23 know, a significant amount of assistance.

24 On the second point -- and, again, this will be
25 covered in our proposal, but on proposed findings of fact

1 and conclusions of law, from our meet-and-confer we
2 understand that what the plaintiff is looking at submitting
3 is just proposed findings of fact and conclusions of law
4 solely related to the issue that Your Honor will be
5 deciding, which is the disgorgement claim. We certainly
6 understand that the local rules provide situations in which
7 proposed findings of fact and conclusions of law are
8 submitted pretrial.

9 In this case, you know, we view that as an issue
10 that is -- you know, the disgorgement claim is a highly
11 complex issue. It's an issue that will likely -- to the
12 extent we get there and there's a finding on liability, it
13 will involve a significant amount of evidence presentation.
14 Our proposal would be that it would be more efficient for
15 the parties to submit proposed findings of fact and
16 conclusions of law post-trial, to the extent Your Honor
17 wants them, and that we can, you know, after the
18 presentation of all evidence, identify, you know, a briefing
19 schedule for that and what exactly Your Honor wants in
20 addition.

21 THE COURT: Okay. Understood. You'll be
22 submitting -- the thing that I care most about is I'm going
23 to get from the parties where they think the instructions
24 are wrong or incomplete or shouldn't be had and where the
25 parties think the verdict form is wrong or misleading or

1 what have you. In other words, I want your feedback on
2 those two things.

3 MR. YOUNG: Yeah, absolutely.

4 THE COURT: Okay. Thank you.

5 MR. YOUNG: Thank you.

6 THE COURT: All right. Anything further for FICO
7 on this matter?

8 MR. HINDERAKER: Minor housekeeping.

9 THE COURT: Yep.

10 MR. HINDERAKER: February 20th, a Monday, is
11 President's Day. I assume the court is closed and our trial
12 is off, but I wanted to hear it from you.

13 THE COURT: Well, if it were up to me, we'd go
14 right ahead and continue on with trial, but the courthouse
15 is closed and God knows they don't want to -- I should have
16 said we could go off the record -- but God knows I don't
17 want to figure out what havoc I would wreak by having trial
18 that day, okay? So we're off on the 20th.

19 MR. HINDERAKER: Yes, Your Honor.

20 THE COURT: Anything further from Federal?

21 MS. GODESKY: No, Your Honor.

22 THE COURT: Thank you, all. We're in recess.

23 (Court adjourned at 5:03 p.m.)

24 * * *

1 I, Paula K. Richter, certify that the foregoing is
2 a correct transcript from the record of proceedings in the
3 above-entitled matter.

4

5 Certified by: s/ Paula K. Richter

6 Paula K. Richter, RMR-CRR-CRC

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